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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
AND
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

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ARGUMENT

I. Congress Could Not Have Intended to Prohibit North Carolina From Establishing a System of Intrastate Motor Carrier Regulation That May Restrain Competition

The State of North Carolina and its Utilities Commission in their *amicus* brief, as well as we in our opening brief,

stressed the crucial importance of this case to North Carolina's regulation of intrastate motor common carrier rates. If left undisturbed, the decision below will require the dismantling of a regulatory scheme that has been in effect for more than 40 years. We further pointed out that the holding that compulsion is necessary for state action immunity for private parties leads to an untenable inference, namely, that although Congress expressly reserved to the states the power "to regulate intrastate transportation provided by a motor carrier" (49 U.S.C. § 10521(b)), it intended to condemn state laws regulating intrastate rates in the same manner as the federal laws regulate interstate rates. Thus, as Judge Clark pointed out in his dissent, "the majority opinion . . . completely ignores the Interstate Commerce Act, public policy, history, and fairness" (Pet. App., 92a).

The Interstate Commerce Act immunizes from the federal antitrust laws the collective formulation of interstate rates by motor common carriers pursuant to agreements filed with and approved by the Interstate Commerce Commission. However, under 49 U.S.C. § 10706(d)(2), the ICC "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure."

North Carolina has adopted a statute immunizing from its antitrust laws the collective formulation of intrastate rates in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. § 5b, 62 Stat. 472. Like its Federal counterpart, NCGS § 62-152.1(e) provides that the North Carolina Utilities Commission "shall not approve . . . any agreement which establishes a

procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." It is this provision of North Carolina's law that the Court below found to preclude the application of the state action doctrine. It held that North Carolina's laws must provide for *only* independently formulated rates or *only* collectively formulated rates, but not both.

The anomalous result is that carriers cannot collectively formulate interstate rates *unless* each carrier has the right to take independent action, but cannot collectively formulate intrastate rates *because* each carrier has the right to take independent action. As the Government itself pointed out, since carriers file individual rates, there would be *less* competition if carriers were required to file only collective rate proposals. Thus, both the Court below and the Government are saying that the states can bring their regulatory schemes into consonance with the federal antitrust laws only by eliminating rate competition altogether. Obviously, this does not further antitrust policy. Rather it stands it on its head.

The Government asserts that "the restrictions imposed by federal law on collective interstate ratemaking by rate bureaus are much more exacting than state regulation of intrastate practices and serve the same basic purpose as the district court's injunction" (Government Br., 32). This is not true. In the Motor Carrier Act of 1980, to which the Government refers, Congress specifically reaffirmed that collective rate formulation by motor common carriers is essential to achieving the goals of the National Transportation Policy. While it established specific guidelines to which rate bureau agreements must conform, as this Court observed in *ICC v.*

American Trucking Assns., ___ U.S. ___, 81 L.Ed.2d 282, 286 (1984): "The most significant deregulatory aspect of the guidelines is a ban on discussions of tariffs applicable solely to individual carriers." And, even this "ban" is subject to exceptions for "general rate increases or decreases", "changes in commodity classifications", and "changes in tariff structures", among others. See, 49 U.S.C. § 10706(b)(3)(D). In contrast, the District Court's injunction flatly prohibits any collective action whatever respecting rate formulation.

Collective rate action by motor common carriers in North Carolina cannot be viewed apart from the pervasive scheme of regulation imposed by North Carolina on those carriers. North Carolina's transportation policy, which is modeled upon the National Transportation Policy, states among its goals to "provide just and reasonable rates . . . without unjust discrimination", "to promote and preserve adequate, economical and efficient service to all the communities of the state . . .", "to foster a coordinated statewide motor carrier service" and "to conform with the national transportation policy and the federal motor carrier acts . . ." See G.S. 62-2, G.S. 62-259. Specifically, with respect to motor common carrier rates, North Carolina has made unlawful "any unreasonable difference as to rates . . . either as between localities or as between classes of services." G.S. 62-140. It has also required that rates be "just and reasonable." G.S. 62-131. Further, the state has mandated a "stable rate structure" and "uniform rates for the same or similar services by carriers of the same class." G.S. 62-152.1.

The District Court's injunction will require the dismantling of this regulatory scheme, for it is manifest that its policies cannot be carried out without collective action with respect to rates. Thus, if there is to be a "stable rate structure" of just, reasonable and non-discriminatory rates,

there must be, not "a loose aggregation of separately established rates, but a single entity composed of interrelated rates" collectively formulated by the carriers. *Class Rate Investigation*, 262 I.C.C. 447, 690 (1945). See H. Rpt. No. 1100, 80th Cong., 1st Sess. (1947), p. 9.[1] So too, if rates are to be uniform for similar services by carriers of the same class, they must be formulated collectively.

The Government acknowledges that this case turns upon Congressional intent. As the Government put it:

> [T]he state action doctrine in antitrust law that this Court articulated in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases rests on dual principles of federalism: the Sherman Act's proscription of anticompetitive conduct is the supreme law of the land, but Congress could not have intended through its silence in the Sherman Act to prohibit action of a state that may restrain competition." (Government Br., 9-10).

We agree that the question is the intent of the Congress and we submit that the answer is plain. In the Motor Carrier Act of 1935 Congress provided that nothing therein "shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." Former Section 202(b)(1) of the Interstate Commerce Act, former 49 U.S.C. § 302(b)(1), 84 Stat. 1500. We submit that,

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[1]Recognizing that a change in one rate "frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination, and undue preference and prejudice which are forbidden by the [Interstate Commerce Act]," the drafters of the Reed-Bulwinkle Act observed that "there would seem to be no practical alternative to consultation among all interested carriers before a change is made in any of their rates." H. Rpt. No. 1100, 80th Cong., 1st Sess. [1947] at p. 8.

especially in view of its subsequent enactment of the Reed-Bulwinkle Act, Congress could not have intended that the states' "exclusive" power be limited by the strictures of the Sherman Act. In other words, it is untenable to infer, as the Court below did, that the Congress intended to pre-empt state law modeled on federal law and designed to carry out in intrastate commerce the same policy that federal law is designed to carry out in interstate commerce.

Reed-Bulwinkle followed on the heels of this Court's decision in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945). Although motor and rail carriers had been collectively formulating rates for submittal to the ICC and state commissions for many years, *Georgia* created uncertainty as to the vulnerability of such collective action to antitrust attack. Therefore, in rapid response to that decision, Congress enacted the Reed-Bulwinkle Act, which authorized the ICC to approve and immunize ratemaking agreements.[2] In considering the immunity it conferred, Congress was well aware that carriers collectively formulated intrastate rates for filing with state commissions. In *Hearings on a Bill to Amend the Interstate Commerce Act With Respect to Certain Agreements Between Carriers; H.R. 2536 Before the Subcomm. on Interstate and Foreign Commerce*, 79th

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[2]The *Georgia* case did not address the need for antitrust immunity to effectuate regulatory goals because the issue before the Court was whether Georgia's complaint alleging a conspiracy involving coercion of carriers and discrimination against it stated a cause of action cognizable by this Court in the exercise of its original jurisdiction. Thus, Congress did not enact the Reed-Bulwinkle Act to overturn *Georgia*, but rather to remove "the existing state of uncertainty [raised by *Georgia* and other antitrust cases] as to the extent to which carriers may engage in joint activity without risk of violating the antitrust laws." S. Rep., No. 44, 80th Cong., 1st Sess. (1947) at 7. Of course, the state of the law would not have been "uncertain" were *Georgia* as dispositive on the lawfulness of collective activity as the Government contends here.

Cong., 1st Sess. (1945), at pages 24-25, Mr. F. G. Hamley, General Solicitor, National Association of Railroad and Utility Commissioners, speaking on behalf of the state regulatory bodies, testified:

> Mr. Chairman, the State regulatory commissions conceive that they have a direct interest in this legislation. Most of the rate bureaus, conferences, and associations which establish, file and publish interstate rates, fares and charges, perform the same functions with regard to *intrastate* rates within their respective geographical boundaries. *What Congress decides to do regarding the operation of these agencies will therefore not only affect interstate commerce regulated by the Interstate Commerce Commission, but also intrastate commerce and State commission regulation thereof.* (emphasis added).

Thus, the Government is wrong when it says that "[t]he differences in the antitrust immunity available for interstate and intrastate ratemaking are simply the result of choices made by Congress. . . ." (Government Brief, 31). The inference to be drawn is that Congress intended to confer antitrust immunity for the collective formulation of both interstate and intrastate rates.[3]

Passage of the Motor Carrier Act of 1980, P.L. 96-296, confirms this view. S. 2245, the Senate version of the bill, proposed in Section 13(a)(3)(B)(iv) that:

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[3]At least one Court has held that Congress could not have intended the regulatory gap "that would result from the ICC being unable to immunize agreements on intrastate rates that affect interstate commerce." In *Atchison, T. & S.F. Ry. Co. v. United States*, 597 F.2d 593, 594 (7th Cir. 1979) the Court rejected the proposition that "the scope of [the ICC's] jurisdiction to immunize railroad rate agreements from the effect of the antitrust laws is less extensive than the antitrust laws themselves."

> (vii) the organization [Bureau] may not docket or handle rates for intrastate transportation without specific authorization from the states involved; . . .

However, the Congress specifically rejected this. As the House Report put it:

> In the bill as originally introduced there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue looking at this area, but for the time being, the *status quo* should apply with respect to intrastate ratemaking. H. R. 96-1069, 96th Cong., 2nd Sess. 29.

As the record herein shows, the "*status quo*" in North Carolina is that the carriers there have been "docketing or handling rates for intrastate transportation" under authority from the State of North Carolina for more than 40 years. In sum, whether this case is viewed as one for "preemption" analysis or "exemption" analysis, the intent of Congress is plain.[4] It is simply inconceivable that Congress intended the antitrust laws to be applied to reach the result of the decision below.

It is especially significant that the activities challenged here have been conducted openly and without challenge for more than 40 years. In *Bankamerica Corp. v. United States*, ____ U.S. ____, 103 S.Ct. 2266, 76 L.Ed.2d 456

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[4]See the discussion of the distinction between these concepts in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), at 61 (Dissent of Justice Rehnquist, in which the Chief Justice and Justice O'Connor joined.)

(1983), this Court disallowed an attempt by the Government to apply the antitrust laws to activity that had been openly carried on for many years without challenge to its lawfulness. At issue was the meaning of Section 8 of the Clayton Act, which the Government argued prohibited interlocking directorates among banking and insurance companies. At 76 L.Ed.2d 463-464, the Court stated:

> [T]he Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government made no attempt . . . to apply Section 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record throughout the period. We find it difficult to believe that the Department of Justice and the Federal Trade Commission, which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open practice of interlocking directorates between banks and insurance companies had it been thought contrary to the law.

The Court, quoting *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941), noted that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." Continuing, the Court said: "In the circumstances of this case, the Government's failure for over 60 years to exercise the power it now claims under Section 8 strongly suggests that it

> did not read the statute as granting such power." (footnotes omitted).

The Court went on to point out in *Bankamerica* that "the business community directly affected *and* the enforcing agencies *and* the Congress have read the statute the same way for 60 years." 76 L.Ed. 2d at 464 (emphasis in original). By substituting "40 years" for "60 years" the identical language could be used to describe the situation here. To use the Court's words: "If changes in economic factors or considerations of public policy counsel the extension of the [Sherman Act to the collective formulation of intrastate rates] it is a simple matter for Congress to say so clearly." 76 L.Ed.2d at 465.

II. Compulsion Is Not Necessary for State Action Immunity for Private Parties

The Government relies solely on *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 429 U.S. 579 (1976), to support its argument that compulsion is necessary for the application of the state action doctrine here. But *Goldfarb* and *Cantor* were the first state action cases decided by this Court in the more than thirty years after *Parker*. Since the *Cantor* decision in 1976 there has been a series of cases in which the doctrine has evolved and matured. In 1980, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. 97, the Court reviewed those decisions, *including Goldfarb* and *Cantor*, and synthesized from them the following two tests for state action immunity when the action is not that of the state itself:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. (citations omitted).

That there is no third "compulsion" test for private parties is clear from this Court's latest state action decision, *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). Again examining its decisions beginning with *Parker*, the Court concluded that when a state legislature adopts legislation or a state supreme court acts in a legislative capacity, the actions are those of the state and "*ipso facto* are exempt from the operation of the antitrust laws." However, when the action is "by others pursuant to state authorization" there must be a clear articulation of policy and active supervision of its implementation. This is the test whether the "others" be non-sovereign public officials or private persons. As the Court pointed out in *Hoover*, it applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor*, in which the defendant was a private party. Referring to those cases, the Court said: "In each of those cases it was necessary for the court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the state 'acting as a sovereign.'" 80 L.Ed.2d at 607, n. 33. Thus, the Court clearly rejected the Government's argument that private parties are subject to a different test for state action immunity than are non-sovereign public parties.

The Government does not make any serious attempt to deal with *Hoover*. It merely makes the bald assertion in a footnote that "nothing in *Hoover* casts any doubt on the Court's earlier holdings in *Goldfarb* and *Cantor* that only compelled private action can be state action" (Government Brief, 25, n. 19). As shown, this is simply wrong. Moreover, our reading of *Hoover* is supported by the recent *en banc* decision of the Fourth Circuit in *N.C. Ex Rel. Edmisten v. P.I.A. Asheville*, 740 F.2d 274 (1984). There the Court stated:

> Since the Supreme Court's decisions in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977), and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the right of a private entity to claim *Parker* immunity is clear. Under *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), a private party has that right even when the state does not compel, but only "authorizes" or "approves" the activity. . . . 740 F.2d at 276-277.

Thus, the Fourth Circuit has joined the Ninth Circuit in expressly rejecting the argument that compulsion is necessary for immunity for private parties under the state action doctrine.[3]

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[3]As we pointed out in our initial brief, in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823, n.8 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982), the Court stated: "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015."

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectively submitted,

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